

M. Vivienne Popperl, OSB #853055
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Attorney for Gail Brehm Geiger, Acting United States Trustee for Region 18

UNITED STATES BANKRUPTCY COURT

DISTRICT OF OREGON

In re

Earth Class Mail Corporation,

Debtor.

Case No. 15-30982-tmb11

UNITED STATES TRUSTEE'S
LIMITED OBJECTION TO
DEBTOR'S MOTION FOR
ORDERS (1) AUTHORIZING AND
SCHEDULING AN AUCTION FOR
THE SALE OF SUBSTANTIALLY
ALL ASSETS OF THE DEBTOR
FREE AND CLEAR OF LIENS
AND OTHER INTERESTS AND
RELATED RELIEF (DOC. # 37)

HEARING DATE: April 6, 2015

HEARING TIME: 11:00 a.m.

The Acting United States Trustee for Region 18, Gail Brehm Geiger ("UST"), by and through Trial Attorney M. Vivienne Popperl, objects to certain provisions contained in the Debtor's Motion For Orders (1) Authorizing and Scheduling an Auction for the Sale of Substantially all Assets of the Debtor Free and Clear of Liens and Other Interests and related relief (Doc. #37) (the "Sale Motion") and represents as follows:

On February 27, 2015, Earth Class Mail Corporation, the debtor in possession (the "Debtor") filed for protection under chapter 11 of the United States Bankruptcy Code.

On March 20, 2015, the Debtor filed the Sale Motion seeking to approve the Asset

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Purchase Agreement (“APA”) which includes certain provisions that should be clarified, amended or stricken as follows:

1. Break-Up Fee: *APA*, par. 7.5 should be clarified to provide that prior to payment of any break-up fee, the unsuccessful buyer will file an itemization of its actual, necessary and reasonable costs and expenses not to exceed \$150,000. Parties in interest would have 10 days to object to payment on reasonableness grounds. *See In re America West Airlines, Inc.* 166 B.R. 908, (Bankr.D.Ariz.1994).
2. Reimbursement of costs: *APA*, par. 11.1 should be clarified to state that this provision is solely a measure of additional consideration agreed to by the buyer and shall not be construed to authorize payment to any professional or to Ignition Venture Partners without further order of the court.
3. Avoidance actions: *APA*, par. 1.3 should be clarified to specify that avoidance actions are “excluded assets.”
4. Accounts payable: *APA*, par. 1.4(a) and Schedule 1.4(a) should be clarified to provide that no payments will be made on account of unsecured claims pending as of the date the case was filed. *See In re Kmart Corp.*, 359 F.3d 866 (7th Cir. 2004). To the extent the buyer will pay costs of administration incurred after the filing date, a list of such costs should be filed with the court before the sale is closed. Notwithstanding the source of payment, no professional who provided services to the Debtor should receive compensation without filing an application for compensation including an itemization of services which is approved by court order.
5. Overbid and bid increments: *APA*, par. 7.5(b) provides for \$10,000 minimum bid increments. The proposed notice provides for \$50,000 minimum bid increments. Any order approving the bid procedures and the notice of the

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sale should clearly identify and clarify the discrepancy.

6. Employment agreements: *APA* par. 1.5(a) and Schedule 1.5(a): Although requested, no copies of the executive employment contracts have been provided to the UST. Their assumption should not be approved without a meaningful opportunity for review of their terms and what influence they may have had on the sale price.
7. Management Carve-Out Plan: *Sale Motion*, Exhibit D: The proposed carve-out to managers constitutes a bonus to James Wilson and Stacey Lee of \$124,871 each, and \$13,875 to Charles Clay and David Smith each. These payments should not be made without an opportunity for the court to evaluate whether they are permitted under 11 U.S.C. § 503(c). *Sale Motion*, Exhibit C, par. 15 should be modified to delete the reference to payment of amounts due under the Management Carve-Out plan.
8. Distribution from the proceeds of the sale: *Sale Motion*, Exhibit C, par. 15 should be amended to require that all payments to creditors other than payment to Comerica Bank from the sale proceeds shall only be permitted after notice, hearing and upon entry of a court order.

Conclusion

The UST respectfully requests that the court decline to approve the Sale Motion without the modifications set forth above.

DATED this 2nd day of April, 2015.

Respectfully submitted,
GAIL BREHM GEIGER
Acting United States Trustee for Region 18

/s/ M. Vivienne Popperl
M. Vivienne Popperl, OSB #853055
Trial Attorney

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FOR ORDERS (1) AUTHORIZING AND SCHEDULING AN AUCTION FOR THE SALE OF
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AND OTHER INTERESTS AND RELATED RELIEF (DOC. # 37)

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2015, I served a copy of the foregoing UNITED STATES TRUSTEE'S LIMITED OBJECTION TO DEBTOR'S MOTION FOR ORDERS (1) AUTHORIZING AND SCHEDULING AN AUCTION FOR THE SALE OF SUBSTANTIALLY ALL THE ASSETS OF THE DEBTOR FREE AND CLEAR OF LIENS AND OTHER INTERESTS AND RELATED RELIEF (DOC. # 37) by mailing a copy of this document, by United States first-class mail, postage prepaid, addressed to the following:

Earth Class Mail Corporation
9450 SW Gemini Drive, No. 101
Beaverton, OR 97008

Frank T. Pepler
DLA PIPER LLP
555 Mission St #2400
San Francisco, CA 97105

GAIL BREHM GEIGER
Acting United States Trustee for Region 18

/s/ M. Vivienne Popperl
M. Vivienne Popperl, OSB #853055
Trial Attorney

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